

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE  
February 28, 2007 Session

**CHATTANOOGA RESTAURANT PARTNERSHIP, INC. v.  
CITY OF CHATTANOOGA BEER BOARD**

**Appeal from the Chancery Court for Hamilton County  
No. 05-1056     Howell N. Peoples, Chancellor**

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**No. E2006-02183-COA-R3-CV - FILED MARCH 26, 2007**

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The City of Chattanooga Beer Board (the “Beer Board”) temporarily suspended for seven days the beer license issued to the Chattanooga Restaurant Partnership d/b/a Chattanooga Food and Drink, which operates a bar commonly known as “the Drink”. The seven day suspension was based on a finding of two violations of Chattanooga City Code 5-48 (A). The Drink appealed the decision to the Trial Court. Following a trial *de novo*, the Trial Court found only one violation of the applicable ordinance and reduced the suspension to three days. The Trial Court also offered the Drink the option of paying a \$1,500 fine in lieu of the suspension. The Beer Board appeals claiming the Trial Court erred in finding only one violation of the ordinance and in offering the Drink the option of paying a fine in lieu of suspension. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the  
Chancery Court Affirmed; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., and SHARON G. LEE, JJ., joined.

Kenneth O. Fritz, Chattanooga, Tennessee, for the Appellant, City of Chattanooga Beer Board.

Douglas M. Cox, Chattanooga, Tennessee, for the Appellee, Chattanooga Restaurant Partnership, Inc., d/b/a Chattanooga Food and Drink.

## OPINION

### Background

This appeal involves an attempt by the Chattanooga Beer Board to temporarily suspend the beer license issued to the Drink. In September of 2005, the Drink was charged with two violations of § 5-48 (A) of the Chattanooga City Code. This ordinance provides, in relevant part, that:

No sale of beer or other alcoholic beverages shall be made to any person under the age of twenty-one (21) years; nor shall any person purchase or otherwise obtain any such beverage for any person under the age of twenty-one (21)....

Following a hearing before the Beer Board, the Drink was found to have committed two violations of § 5-48 (A). The Beer Board suspended the Drink's beer license for a total of seven days. Although the Beer Board had the statutory authority to offer the Drink a fine in lieu of the temporary suspension, that option was not given to the Drink.

The Drink filed a petition for writ of certiorari with the Hamilton County Chancery Court and requested a *de novo* hearing. The Chancery Court granted the writ and the decision of the Beer Board was stayed pending a *de novo* trial on the merits.

The trial was conducted in June of 2006, with the first witness being Erin Keller ("Keller"), who was twenty years old at the time of trial. Keller testified that on September 23, 2005, she went to the Drink and she "just kind of walked in" without showing any identification. According to Keller:

A. I was sitting there talking to some friends, and a guy bought a drink and I took a sip of it and sit (sic) it down.... It did have alcohol in it.

Q. When the officers confronted you about the drink you had, you admitted you had an alcoholic beverage?

A. I believe so.

Q. At any point while you were in the club, were you checked for identification as to your age?

A. I was only in there for about 20 minutes. I wasn't there very long. I had just gotten there.

Keller then added that she did not actually purchase an alcoholic drink and she did not offer anyone money to buy her a drink. Keller also stated that she “felt like” she was asked by the police officers to cooperate with them in the prosecution of the Drink and, in return, she would not be cited for underage consumption of alcohol.

The next witness was Officer John Collins (“Officer Collins”). Officer Collins has been with the Chattanooga Police Department for thirteen years and with the beer inspector’s office for four years. Officer Collins testified that on September 23, 2005, he and several other officers went into the Drink to do a “bar check.” Officer Collins then described the following events:

We went into the bar, looked around. I saw Ms. Keller with a drink in her hand. I approached her. I showed her my badge, identified myself.... She showed me an ID that did say she was underage. I asked her where she got the drink; she said she got it from an employee, then she changed her story to she got it from a friend. We did take her outside at that time, contacted her parents....

Officer Collins also approached another patron of the Drink named Kasey Nicholson (“Nicholson”). Officer Collins described the situation involving Nicholson as follows:

I approached Ms. Nicholson and asked her for an ID. She stated she didn’t have one. I asked her what she was drinking. She told me it was Vodka and Sprite. She did not have an arm band on, which The Drink uses for people that are over 21. She also did not have a marking on her hand, which The Drink uses for people under the age of 21. She didn’t have any markings either way....

I told [Keller and Nicholson that] we were not going to charge then with the offense, but we were going to subpoena them to appear before the Beer Board to give testimony.

The next witness was Sergeant Mark Haskins (“Sergeant Haskins”). Sergeant Haskins testified that he saw Keller with a drink that later was determined to be an alcoholic drink. Sergeant Haskins did not witness Nicholson with a drink, nor did he witness an employee of the Drink serve any alcoholic beverages to patrons who were underage.

The Drink called Nicholson as a witness. Nicholson, who was 20 years old, testified that she was not drinking alcohol on the night in question because she was a designated driver. Nicholson stated that she was at the Drink for approximately 30 to 45 minutes with a group of friends. Several drinks were served at their table, and Nicholson took one of the drinks that was “sitting at the table.” When she picked up the drink, Nicholson did not know whether it had alcohol in it. Eventually, Nicholson was approached by a police officer. According to Nicholson:

I was standing on the side of my table, and they walked up to me. I had a Sprite and lime in my hand. I didn't have a wristband and I didn't have an X. They asked me where my wristband was and how I got in there without anything. So I told them I just walked in with a group, we were escorted in to the table, and that's why. He said, Will you please come with me? ... And so they escorted me out. We went outside, and they asked [for] all my information several times, and called my dad....

Q. At any time during the evening, did you tell the officers you had been drinking, or that you had an alcoholic beverage?

A. Yes.

Q. You did. Tell us why. Why would you say that?

A. Because when they first approached me, I was scared to death. I didn't know what was going on. And then when we got outside in the parking lot, I calmed down and, you know, collected my thoughts, and I told them no, I wasn't drinking.

I spoke to my dad, and when I got to speak to my dad, he said ... they're going to let you go, just work with them.

So he said if you just stick with your first story and just stick with everything that I say, they will let you go.

Obviously I didn't want to go to jail, so I just said Okay....

Q. Did [the police officers] ever say anything to you about what you needed to say about the Chattanooga Drink on how you got alcohol in your drink that evening?

A. No. They just told me to stick to your first story and we'll get you out of here. If not, then we will take you in....

At the conclusion of the proof, the Trial Court announced its decision from the bench. The Trial Court stated, in relevant part, as follows:

The Chattanooga Restaurant Partnership doing business as Chattanooga Food and Drink was charged with selling alcoholic beverages to two persons under the age of 21....

The evidence before the court is that one person named Erin Keller was present in the plaintiff's place of business on September 23, 2005, and she was in possession of an alcoholic beverage.

Her testimony before the Board and her testimony here in court is that she did not purchase that alcoholic beverage from an employee of the plaintiff. She testified that a guy who was in the place of business had bought her a drink and that she took a sip from it.

Her testimony here in court is consistent with her testimony before the Board. So the Court finds no violation occurred with the person name Erin Keller.

The second incident of selling to a person under the age of 21 involves Kasey Nicholson. Ms. Nicholson's testimony is that she was in the place of business with a group of people, that drinks were ordered and drinks were brought to the table, that the drink she had was served at her table, and that when she picked it up, she didn't know whether it was an alcoholic beverage or not.

When she was first approached by the officer he asked what she was drinking, she told him vodka and Sprite. After she learned his identity, she changed the description to Sprite and lime. And that has been her testimony here.

However, it is significant to the Court that drinks in general were served to the table without any person taking the responsibility of ensuring that an underage person didn't get one of the alcoholic drinks. So the Court finds a violation with regard to Ms. Nicholson.

Having found a violation, the appropriate punishment appears to be the same that has been consistently imposed by the Board apparently during the years October 2004 forward, and that [is] a suspension of three days; or in lieu of the suspension, payment of a \$1,500 fine.

After the Trial Court announced its decision, the Beer Board's counsel verbally asked the Trial Court to reconsider its ruling. Specifically, the Beer Board requested the Trial Court find a violation with respect to Ms. Keller because the ordinance prohibits any person from "purchas[ing] or otherwise obtain[ing] any such beverage for any person under the age of 21." The Trial Court concluded that particular provision in the ordinance could be used to charge the individual who

purchased the alcoholic beverage for Ms. Keller, but could not be used to support a violation against the Drink.

After the Trial Court entered its final judgment, the Beer Board filed a motion to alter or amend that judgment, claiming that because the Beer Board had not originally offered the Drink the option of paying a fine in lieu of suspension of its license, the Trial Court was without authority under Tenn. Code Ann. § 57-5-108(a)(2)(A) to give the Drink that option. Stated differently, the Beer Board asserted that the Trial Court only had authority to impose a fine. The Trial Court denied the Beer Board's motion to alter or amend the judgment.

The Beer Board appeals raising the following issues, which we quote:

- I. Whether T.C.A. § 57-5-108(d) limits the scope of review of decisions made by the Appellant, City of Chattanooga Beer Board, in a *de novo* hearing.
- II. Whether the Trial Court erred in finding that the Appellee committed one (1) offense of the Appellant's beer ordinances and regulations.
- III. Whether a violation of Chattanooga City Code § 5-48 requires that an underage person personally purchase an alcoholic beverage.<sup>1</sup>

### **Discussion**

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted “under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts.” *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

The parties are in agreement that the Beer Board had the authority to suspend the beer license of the Drink's owner or, in the alternative, to offer the owner the option of paying a fine in lieu of suspension. *See* Tenn. Code Ann. § 57-5-108(a)(2)(A). The relevant statute goes on to provide:

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<sup>1</sup> The Beer Board raised a fourth issue addressing whether the Drink was properly notified of two (2) alleged violations of the applicable ordinance. However, the Drink acknowledges that it received proper notice that the Beer Board was alleging two violations of City Code §5-48 (A).

(d) The action of such agency in connection with the issuance of any order of any kind, including the revocation or suspension of a license or permit, imposition of a civil penalty or the refusal to grant a license or permit under §§ 57-5-105, 57-5-106 and this section, may be reviewed by statutory writ of certiorari, with a trial de novo as a substitute for an appeal, the petition of certiorari to be addressed to the circuit or chancery court of the county in which any such order was issued.

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(f) The provisions of this section shall be the sole remedy and exclusive method of review of any action or order that may have been issued by any county legislative body, or any committee appointed by any county legislative body, or from any board or commission authorized under §§ 57-5-105 and 57-5-106, including the refusal or failure to grant any license or permit or the imposition of a civil penalty. The provisions of the Tennessee Rules of Civil Procedure shall be applicable in connection with such review. Any party dissatisfied with the decree of the court may, upon giving bond as required in other cases, appeal, where the cause shall be heard upon the transcript of the records from the circuit court.

(g) A judge of any court of record shall have the authority to supersede, stay or enjoin any order of an agency revoking, suspending or imposing a civil penalty made under the authority of this chapter for good cause shown on part of the petitioning party thereof. No circuit or chancery judge shall have the authority to grant any such extraordinary writ except the judge of a court of record to which the petition for certiorari is addressed.

Tenn. Code Ann. § 57-5-108(d), (f) & (g).

Tenn. Code Ann. § 57-5-108(d) unequivocally states that a trial in the circuit or chancery court is *de novo*. This means that “the cause is tried as if it originated in the circuit or chancery court” and the trial judge “is required to make an independent judgment on the merits ... [which] results in the trial judge substituting his judgment for that of the beer board...” See *Richards v. Lewisburg Alcoholic Beverage Comm’n*, 543 S.W.2d 852, 854 (Tenn. 1977)(quoting *Cantrell v. DeKalb Co. Beer Board*, 376 S.W.2d 480 (1964)). If the Beer Board in the present case had the authority to offer the license holder the option of paying a fine in lieu of suspension, which it did, then it necessarily follows that the Trial Court must have that same authority when “substituting” its judgment for that of the Beer Board. This is even more apparent when considering the language in Tenn. Code Ann. § 57-5-108(g) which states that a trial court “shall have the

authority to *supersede*, stay or enjoin *any order* of an agency revoking, suspending or imposing a civil penalty.” (emphasis added) No limitation is expressed in this statute. If a trial court can supercede an order imposing a civil penalty, there is no reason under that statute, or otherwise, why that same trial court cannot supercede an order which originally did not offer the license holder the option of paying a civil penalty. We conclude that the Trial Court had the authority to offer the owner of the Drink the option of paying a fine in lieu of suspension.

The next issue is whether the Trial Court erred when it found only one violation of Chattanooga City Code § 5-48 (A). As set forth previously, the ordinance provides:

No sale of beer or other alcoholic beverages shall be made to any person under the age of twenty-one (21) years; nor shall any person purchase or otherwise obtain any such beverage for any person under the age of twenty-one (21)....

The Trial Court determined that, based on the language of the ordinance, the Drink did not commit a violation when, as described by Keller, some “guy” purchased and gave her the drink. The Trial Court apparently believed Keller’s testimony that she did not purchase the drink and some “guy”, who presumably was at least 21 years old, purchased that drink for her. In *Wells v. Tennessee Bd. of Regents*, our Supreme Court observed:

Unlike appellate courts, trial courts are able to observe witnesses as they testify and to assess their demeanor, which best situates trial judges to evaluate witness credibility. *See State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990); *Bowman v. Bowman*, 836 S.W.2d 563, 566 (Tenn. Ct. App. 1991). Thus, trial courts are in the most favorable position to resolve factual disputes hinging on credibility determinations. *See Tenn-Tex Properties v. Brownell-Electro, Inc.*, 778 S.W.2d 423, 425-26 (Tenn. 1989); *Mitchell v. Archibald*, 971 S.W.2d 25, 29 (Tenn. Ct. App. 1998). Accordingly, appellate courts will not re-evaluate a trial judge's assessment of witness credibility absent clear and convincing evidence to the contrary. *See Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315, 315-16 (Tenn. 1987); *Bingham v. Dyersburg Fabrics Co., Inc.*, 567 S.W.2d 169, 170 (Tenn. 1978).

*Wells v. Tennessee Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999).

We agree with the Trial Court’s interpretation of the ordinance. Based on the facts as found by the Trial Court, the “guy” who purchased the drink for Keller is the one who violated the ordinance. The language of the ordinance does not prohibit the Drink from selling an alcoholic drink to a patron who is of legal drinking age who then, without the Drink’s knowledge and in violation of the ordinance, gives the alcoholic drink to a minor. If that is the seller’s conduct the



ordinance is intended to prohibit, then the ordinance should so state. We conclude that the clear language of the ordinance is such that it would not support a violation against the Drink based on the relevant facts as found by the Trial Court. Accordingly, we need not decide here whether it would be permissible to enact an ordinance which makes it a violation by a seller to sell an alcoholic drink to someone who is of legal drinking age when that person, unbeknownst to the seller, then gives that drink to a minor. The judgment of the Trial Court finding only one violation of the ordinance is affirmed.

The final issue raised by the Beer Board is “[w]hether a violation of Chattanooga City Code § 5-48 requires that an underage person personally purchase an alcoholic beverage.” As discussed above, the answer to this question is “no.” If someone who is at least 21 years of age purchases a drink and then gives that drink to a minor, then *the person who purchased the drink* can be charged with a violation and the minor need not actually purchase the alcohol. We note, however, that we do not hold here that a seller who sells a drink to someone who is of legal drinking age knowing that the person who purchased the drink intends to give that drink to a minor does not violate this ordinance as we are not confronted with that situation in this case.

### **Conclusion**

The judgment of the Trial Court is affirmed and this cause is remanded to the Trial Court for collection of the costs below. Costs on appeal are taxed to the Appellant, City of Chattanooga Beer Board, and its surety.

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D. MICHAEL SWINEY, JUDGE